STATE OF MICHIGAN
IN THE COURT OF APPEALS

DONALD J. TRUMP, **Plaintiff,** **V** **MICHIGAN BOARD OF STATE CANVASSERS and CHRISTOPHER THOMAS, Director of Elections, in his official capacity,** **Defendants.**	**Case No. 335958** **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR APPLICATION FOR LEAVE TO APPEAL**

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I. INTRODUCTION

Although the Michigan Board of State Canvassers and Director of Elections ("Defendants") are required to conduct a recount pursuant to Michigan law, Green Party Presidential candidate Jill Stein ("Stein") asked a federal court to circumvent Michigan law, which the federal court obliged. The Federal Court's ruling highlights why immediate consideration is essential in this case to end a fruitless recount that will cost Michigan tens of millions of dollars.

II. ARGUMENT

Two Michigan Election Law requirements are implicated in this supplemental brief: (1) "[t]he board of state canvassers shall not begin a recount unless 2 or more business days have elapsed since the board ruled on the objections under this subsection, if applicable," (MCL 168.882(3)); and (2) "A candidate voted for at a primary or election for an office may petition for a recount of the votes if all of the following requirements are met…The petition sets forth as nearly as possible the nature and character of the fraud or mistakes alleged" (MCL 168.879(1)(f)).

A. Federal Lawsuit Compels Recount to Commence In a Manner Contrary to Michigan Election Law.

Hours after Plaintiff filed the instant lawsuit, Stein filed a separate lawsuit in U.S. District Court for the Eastern District of Michigan, asking the federal court to issue a Temporary Restraining Order to expedite the recount. See Exhibit 1. U.S. District Court Judge Mark Goldsmith held an emergency hearing at 10:30 a.m. yesterday, which included several witnesses giving oral testimony regarding alleged irregularities such as supposed "Russian hackers, who may or may not have been government-affiliated." Early this morning (12:06 a.m.), Judge Goldsmith entered a Temporary Restraining Order directing:

> Defendants and any persons acting in concert with them are ordered to cease any delay in the commencement of the recount of the presidential vote cast in Michigan as of noon on December 5, 2016. At that time, the recount shall commence and must continue until further order of this Court. Defendants shall instruct all governmental units participating in the recount to assemble necessary staff to work sufficient hours to assure that the recount is completed in time to comply with the "safe harbor" provision of 3 U.S.C. § 5.2. Goldsmith Order, Exhibit 2.

To provide opposing candidates an opportunity to appeal an adverse Board of State Canvassers ruling or deadlock, MCL 168.879(1)(f) requires the Bureau of Elections to wait two business days after Board action before commencing a recount. Trump filed the instant appeal hours after the Board's action in an effort to allow this Court to resolve the matter before the recount's statutory start time. Despite Plaintiff's pending appeal before this Court and despite the Michigan Election Law's clear requirement that a recount not start until two business days after the Board's deadlock, Judge Goldsmith issued a Temporary Restraining Order directing Defendants to immediately proceed with the recount notwithstanding the pendency of this action.

As the District Court acknowledged when it issued its order granting Plaintiffs' motion for a temporary restraining order, at the time Stein filed her motion for relief in Federal Court, Donald J. Trump and the Michigan Attorney General had both filed objections that are currently the subject of the instant state court litigation. Given these pending state court proceedings, the Federal Court should have abstained from ruling on matters of state law that are currently before this Court.

Several considerations support abstention when "challenges are made to state statutes," such as the concern "under *Pullman* that a federal court will be forced to interpret state law without the benefit of state-court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision

advisory and the litigation underlying it meaningless." *Moore v Sims*, 442 US 415, 423; 99 S Ct 2371; 60 L Ed 2d 994 (1979). Moreover, *Younger v Harris*, 401 US 37; 91 S Ct 746; 27 L Ed 2d 669 (1971) also "counsels federal-court abstention when there is a pending state proceeding, [and] reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore*, 442 US at 423. And as the State argued before the federal district court, "Burford abstention is appropriate where timely and adequate state-court review is available and (1) a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the case at bar,' or (2) the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" (Resp. in Opp'n to Mot. for Temporary Restraining Order, ECF No. 6, Pg Id 516) (quoting *Caudill v Eubanks Farms, Inc*, 301 F3d 658, 660 (CA6, 2002)).

The federal district court's failure to acknowledge that "[s]tate courts are the principal expositors of state law," *Moore*, 442 US at 429, and to recognize these principles of abstention has resulted in chaos. County clerks who went home for the day on Friday, expecting a statewide recount to be conducted in accordance with state law, expected the recount to begin on Tuesday night or Wednesday morning. Those same individuals arrived at the office on Monday morning to learn that a federal district court, without awaiting for an impending decision by the state courts, found a "strong likelihood" that Michigan Election Law is unconstitutional as applied here and, thus, that the recount would be starting in mere hours. Situations like this are precisely why the abstention doctrines exist. The federal court made a decision that could—and, as Plaintiff asserts, should—be discredited by this Court "at any time," thus rendering it "meaningless." In the meantime, the decision has caused chaos and financial loss, which would

not have resulted had the district court abstained from ruling on matters of state law pending in state court, as it should have.

Accordingly, because state courts should rule on state law issues, this Court should rule that its order to cease the recount supersedes any conflicting Federal Court order addressing federal law because the Recount Petition does not comply with Michigan law.

B. Recount Petition Fails to Include Evidence Stein Possesses.

MCL 168.879(1)(b) requires a recount petition to "contain specific allegations of wrongdoing only if evidence of that wrongdoing is available to the petitioner." MCL 168.879, therefore, requires a petition to include evidence if the petitioner has such evidence. Although affidavits submitted on behalf of the Green Party in the federal lawsuit referenced above attest to the existence of voter fraud, the Recount Petition fails to include such evidence. *See* Wallach Affidavit attached as Exhibit 3; Jones Affidavit attached as Exhibit 4; Hursti Affidavit attached as Exhibit 5; Halderman Affidavit attached as Exhibit 6. Stein's failure to include evidence of fraud or mistake renders the Recount Petition noncompliant with MCL 168.879. Because the Board and the Director of Elections cannot proceed with a recount based on a Recount Petition that does not comply with Michigan Election Law, this Court should immediately cease the recount.

III. CONCLUSION

For the reasons stated herein and in Plaintiff's Motion for Immediate Consideration and Stay, this Court should state the commencement of the recount pending resolution of this case.

Dated: December 5, 2016

Respectfully submitted,

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